BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER OOTS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,232
HEATRON, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL FIRE INSURANCE COMPANY	)	
OF HARTFORD	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated September 13, 2006. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to prove that he suffered an accidental injury arising out of and in the course of his employment with respondent.

ISSUE

Did claimant prove that he suffered an accidental injury arising out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be affirmed.

Claimant alleges that he suffered an accidental injury arising out of and in the course of his employment with respondent, with injuries suffered to his low back and bilateral knees. Claimant claimed that his low back problems began when respondent changed his job duties to working while standing only. This forced standing position allegedly aggravated his preexisting low back problems. Claimant testified that he told his team leader of his back problems and requested medical treatment.

However, claimant's department manager, Karen King, and respondent's vice president of human resources and safety, Sandra Van Wijk, testified contrary to claimant. Ms. King testified that claimant advised her his back problems were preexisting and he had always had back problems. She also stated that the working-while-standing policy had only just been implemented when claimant complained and refused to work at the standing job. Ms. Van Wijk testified that in his recruiting interview, claimant denied having low back problems. But when the standing policy changed, claimant advised her that he had a medical condition which would not allow him to stand. Ms. Van Wijk stated that claimant led her to believe that his back problems preexisted the job with respondent. This conversation with claimant occurred only one day after the implementation of the standing policy. She also testified that claimant never talked to her about his knees.

Ms. King also testified that claimant's back condition pertained to a preexisting condition. The only conversations she had with him about his knees involved discussions about claimant having injuries from the military and the fact the military was going to replace his knees.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

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[1] K.S.A. 44-501 and K.S.A. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[4] K.S.A. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[7]

The ALJ, in the Preliminary Decision, found:

> . . . insufficient evidence of a compensable injury has been provided so far, pre-existing compensable complaints presently appear to be responsible for Claimant's present need for treatment . . . .

The evidence as to whether claimant had an accidental injury arising out of and in the course of his employment hinges to a great degree on the testimony of the three lay witnesses. The testimony of claimant directly conflicts with the testimony of Ms. King and Ms. Van Wijk. An administrative law judge is in the enviable position of being able to assess the credibility of witnesses when they testify before him or her at hearing. The Board, at times, gives some deference to the administrative law judge's assessment of a witness's credibility. Here, the ALJ found claimant's explanation of the conflicts to be lacking. This Board Member, for preliminary purposes, agrees with that assessment.

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated September 13, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
James R. Hess, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

[8] K.S.A. 44-534a.